Supreme Court, U.S.
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No. 03-686

IN THE

Supreme Court of the United States

THE REPUBLIC OF HONDURAS, THE REPUBLIC OF ECUADOR, and THE REPUBLIC OF BELIZE,

Petitioners,

v.

PHILIP MORRIS COMPANIES, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Does the revenue rule, which has long barred one country from directly or indirectly enforcing its tax laws in the courts of another country, preclude Ecuador, Honduras, and Belize from using the U.S. courts and the RICO statute to recover three times the lost taxes and related costs allegedly resulting from cigarette smuggling?

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Respondent Altria Group, Inc. f/k/a Philip Morris Companies Inc. does not have a parent corporation and there is no publicly held company that owns 10% or more of its stock.

Respondent Philip Morris USA Inc. f/k/a Philip Morris Incorporated has the following parent corporation:

Altria Group, Inc.

No other publicly held company owns 10% or more of its stock.

Respondents R.J. Reynolds Tobacco Company, R.J. Reynolds Tobacco International, Inc., and Northern Brands International, Inc. have the following parent corporation:

R.J. Reynolds Tobacco Holdings, Inc.

No other publicly held company owns 10% or more of their stock.

Respondent Brown & Williamson Tobacco Corporation has the following parent corporations:

BATUS Tobacco Services, Inc.

British American Tobacco p.l.c.

British American Tobacco p.l.c. is the only publicly held company that owns 10% or more of Brown & Williamson Tobacco Corporation's stock.

Respondent BATUS Holdings, Inc. has the following parent corporations:

Louisville Securities Ltd.

British American Tobacco p.l.c.

British American Tobacco p.l.c. is the only publicly held company that owns 10% or more of BATUS Holdings, Inc.'s stock.

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INTRODUCTION

The U.S. Court of Appeals for the Eleventh Circuit invoked the longstanding revenue rule to bar attempts by Honduras, Ecuador, and Belize (the "Republics") to collect foreign taxes via civil RICO suits in U.S. courts. That ruling is consistent with more than 200 years of case law from around the world, and with every state and federal court decision in this country. Not only is there no conflict in the Circuits on the application of the revenue rule to these facts, but this Court denied certiorari just last term in a virtually identical suit by Canada, whose claims were rejected by the U.S. Court of Appeals for the Second Circuit on the same grounds applied by the Court of Appeals here. *Attorney General of Canada v. R.J. Reynolds Tobacco Holdings, Inc.*, 268 F.3d 103 (2d Cir. 2001), *cert. denied*, 537 U.S. 1000 (2002).

In *Attorney General of Canada*, the Solicitor General argued that certiorari should not be granted because the Second Circuit correctly held that the revenue rule serves important separation of powers interests: the rule's prohibition on the use of U.S. courts to collect foreign taxes provides the baseline from which the Executive has negotiated treaties with certain allies providing limited, reciprocal tax collection assistance, while withholding such privileges from other nations. Petitioners claim that the position the United States took in opposing certiorari in *Attorney General of Canada* "may have been overtaken by events." Petition for a Writ of Certiorari ("Pet.") at 9-10 n.1. But the only relevant event since this Court denied Canada's petition is that the Eleventh Circuit has joined the Second. Now, two circuit courts have ruled that foreign governments may not circumvent the treaty process, and eschew their own courts, by recasting foreign tax claims as civil RICO suits in

an effort to collect three times their allegedly lost tax revenues and related expenses. Such complete agreement among the Circuits provides no basis for this Court to alter its decision from just last term to deny certiorari on this very issue.

The Republics try to conjure up a split where none exists by pointing to a case that allowed a criminal prosecution by the U.S. government to proceed in the face of a revenue rule challenge. Pet. at 2-3 (citing *United States v. Pasquantino*, 336 F.3d 321 (4th Cir.) (en banc), *pet. for cert. filed*, No. 03-725 (Nov. 14, 2003)). But, as the Court of Appeals in *Pasquantino* was careful to acknowledge, a criminal prosecution by the U.S. government does not implicate any of the concerns that have led courts uniformly to reject suits by foreign governments to enforce their tax laws. The decision to bring charges was made by the Executive branch, which could assess any foreign policy implications; the prosecution did not enforce any foreign revenue laws; and the result of the prosecution was not an award of damages to a foreign government for lost tax revenues, precisely what the revenue rule forbids. *See* 336 F.3d at 331.

Here, by contrast, the revenue rule is directly implicated because "[t]he Republics' claims fundamentally deal with the adjudication of foreign tax claims," and all of their claims "involve schemes to avoid paying taxes and seek to collect these unpaid taxes." *Republic of Honduras v. Philip Morris Cos.*, 341 F.3d 1253, 1257 (11th Cir. 2003), Appendix to Petition for Writ of Certiorari ("Pet. App.") at 8-9. As the Eleventh Circuit recognized below, and as the Second Circuit recognized in *Canada*, such claims are forbidden by the revenue rule. There is no authority to the contrary—here or anywhere in the world—and no reason for this Court to revisit this long-settled question.

STATEMENT OF THE CASE

On June 5, 2000, Ecuador filed its original complaint, seeking to recover lost tax revenues and related costs resulting from an alleged scheme to smuggle cigarettes into the country. R-1.[1] Although the complaint alleged a widespread conspiracy targeting Ecuador, the only specific allegations detailed a scheme to smuggle cigarettes into *Canada*—because Ecuador had simply copied large portions of its complaint from the one in the *Attorney General of Canada* case, which was dismissed by the Second Circuit in a ruling this Court declined to review last term. *Id.* at 22-26; *see also* R-15 at 19 n.9. In subsequent months, Ecuador's counsel filed identical complaints on behalf of Honduras and Belize, changed only by substituting "Honduras" or "Belize" for "Ecuador."

Plaintiffs then filed amended complaints, again virtually identical, alleging that they have incurred millions or billions of dollars of damages from "the loss of customs duties, fees, taxes, money and property" by reason of alleged schemes by defendants to smuggle contraband cigarettes. R-1 (II) at 8. According to plaintiffs, these "schemes supplant the sales of lawfully sold cigarettes on which levies, duty, money and taxes would have been paid." *Id.*

The district court dismissed the amended complaints based on the revenue rule, an "age-old common law doctrine

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1. Although petitioners did not submit any portion of the record below to this Court, they have cited liberally and inaccurately to the "record" ("R"). For example, citing their amended complaints, petitioners assert that Miami bank accounts of the RJR and Philip Morris defendants were frozen by drug enforcement agencies. *See* Pet. at 4. But these patently false allegations are nowhere found in the amended complaints.

provid[ing] that courts of one sovereign will not enforce unadjudicated tax claims of other sovereigns." Pet. App. at 28. Because plaintiffs' civil RICO suits were actions to enforce foreign tax laws and to recover foreign tax revenues, the court concluded that the suits presented "precisely the type of meddling in foreign affairs the revenue rule prohibits." *Id.* Given the impact on foreign relations, the court concluded that "separation of powers mandates the continued enforcement of the rule" because authority over foreign affairs is delegated to the political branches in our constitutional scheme, and "'Congress has seen fit to handle this problem in another manner.'" *Id.* at 32 (quoting *United States v. First Nat'l City Bank*, 321 F.2d 14, 21 (2d Cir. 1963)). In particular, the court found that international tax collection has only been allowed in the U.S. in very limited circumstances, and when allowed at all, has only occurred through the treaty process—permitting the U.S. to secure reciprocal rights. *Id.* at 31-32. And given Congress's decision to address foreign tax collection through the treaty process, and the revenue rule's long-standing pedigree in U.S. and international law, the court rejected the Republics' suggestion that Congress abrogated the rule through enactment of a statute of general application like RICO. *Id.*

The Eleventh Circuit affirmed, concluding that plaintiffs' claims "fundamentally deal with the adjudication of foreign tax claims" and seek the collection of "unpaid taxes." *Id.* at 7, 8. The Court of Appeals recognized that the Executive and Congress "have expressed a 'continuing policy preference against enforcing foreign tax laws . . . ,'" and that they "undisputedly have not entered into any type of tax treaty with any of the Republics that would allow the Republics to enforce their tax claims underlying this suit in this country."

Id. at 12 (quoting *Attorney General of Canada*, 268 F.3d at 118). Thus, the Court of Appeals held that it could not consider plaintiffs' claims unless the political branches took action in favor of allowing unadjudicated foreign tax claims in domestic courts, *id.*, and it rejected the Republics' argument that RICO had this effect because "it misapprehends basic rules of statutory interpretation" that Congress legislates against the backdrop of the common law. *Id.* at 13. In this regard, the Court of Appeals found that "[l]ittle question exists that the revenue rule is a 'long-established and familiar principle'" of the common law, and that the language of RICO and the statutory purpose offer no hint that Congress intended to abrogate the rule. *Id.* at 14 (quoting *Attorney General of Canada*, 268 F.3d at 111-12).

REASONS FOR DENYING THE PETITION

The decision below does not conflict with a decision of this Court, any Court of Appeals, or any court anywhere in the world for that matter. Two Courts of Appeals have now considered the precise question presented here, and both have reached the identical conclusion: a foreign government may not recast a foreign tax claim as a RICO violation in an effort to collect three times its lost tax revenues and related expenses as a result of an alleged smuggling scheme. In rejecting such claims, both Courts of Appeals invoked the revenue rule, both agreed that the rule bars a foreign government from seeking to enforce, directly or indirectly, a claim for foreign taxes, and both agreed that application of the rule in the U.S. is grounded in respect for sovereignty and separation of powers.

I. There is No Circuit Split on The Question Presented.

A. The Revenue Rule Bars Direct and Indirect Attempts to Enforce Foreign Tax Claims.

It "has long been a general rule that one sovereignty may not maintain an action in the courts of another state for the collection of a tax claim." *United States v. First Nat'l City Bank*, 321 F.2d 14, 23-24 (2d Cir. 1963); *see also Honduras*, Pet. App. at 6 ("The revenue rule is a long-standing common law rule that prevents the courts of one sovereign from enforcing or adjudicating tax claims from another sovereign"); *Her Majesty the Queen in Right of the Province of British Columbia v. Gilbertson*, 597 F.2d 1161, 1166 (9th Cir. 1979) ("The revenue rule has been with us for centuries and has become firmly embedded in the law"); 1 DICEY & MORRIS, The Conflict of Laws 97 (13th ed. 2000) ("there is a well-established and almost universal principle that the courts of one country will not enforce the penal or revenue laws of another country"). The rule has been universally invoked for more than two centuries from the sweeping pronouncement of Lord Mansfield in *Holman v. Johnson*, 98 Eng. Rep. 1120, 1121 (K.B. 1775), that "no country ever takes notice of the revenue rules of another," to the dismissal four months ago of the suits by the Republics. Indeed, petitioners do not cite a single case in which a foreign government has been allowed to enforce its tax laws directly or indirectly in the courts of another country, and no such case will be found.[2]

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2. This Court has acknowledged the longstanding "principle enunciated in federal and state cases that a court need not give effect to the penal or revenue laws of foreign countries or sister states." *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 413 (1964). Likewise, the dissent in *Sabbatino* recognized that "our courts

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The authorities are unanimous that the revenue rule precludes both direct *and indirect* attempts to collect foreign taxes, and the reason is straightforward: "If [the rule] were otherwise, litigants could freely avoid the impact of the revenue rule by bringing tax claims under the guise of non-tax-related causes of action." *Honduras*, Pet. App. at 7; *see also Banco do Brasil, S.A. v. A.C. Israel Commodity Co.*, 239 N.Y.S.2d 872, 875 (1963) (rejecting fraud claim for evasion of currency controls because Brazil "is seeking, by use of an action for conspiracy to defraud, to enforce what is clearly a revenue law"); *United States v. Harden*, [1963] S.C.R. 366, 371 (Canadian Supreme Court rejects breach of contract claim settling tax dispute in light of "the special principle that foreign States cannot directly or indirectly enforce their tax claims"); *QRS 1 APS v. Frandsen*, [1999] 3 All E.R. 289, 291 (C.A.) ("It is a fundamental principle of English law that our courts will not directly or indirectly enforce the penal, revenue or other public laws of another country. On the English authorities it is clear that the present action falls foul of that rule: in substance it involves the indirect enforcement of Denmark's revenue law." (internal citation omitted)).

(Cont'd)

customarily refuse to enforce the revenue and penal laws of a foreign state, since no country has an obligation to further the governmental interests of a foreign sovereign." *Id.* at 448 (White, J., dissenting on other grounds). Both the majority and dissenting opinions reiterate what had long ago been accepted by the Court. *See, e.g., Huntington v. Attrill*, 146 U.S. 657, 671 (1892) (observing that courts cannot entertain "suits . . . for the recovery of pecuniary penalties for any violation of statutes for the protection of [another country's] revenue") (quoting *State of Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265, 290 (1888)).

As recognized below and by the Second Circuit in *Attorney General of Canada*, because international tax collection raises sensitive issues of foreign relations, it has always been treated as a matter governed entirely by treaty—a subject committed by the U.S. Constitution to the political branches of government. *First Nat'l City Bank*, 321 F.2d at 24 ("The apparent necessity of tax treaties underscores the conclusion that Congress has seen fit to handle this problem in another manner."); *Attorney General of Canada*, 268 F.3d at 119 ("the political branches of our government have clearly expressed their intention to define and strictly limit the parameters of any assistance given with regard to extraterritorial enforcement of a foreign sovereign's tax laws"). For example, the Republics suggest that they use "import taxes" to keep imported cigarettes from being "competitive" with domestic products, Pet. at 1-2, a goal that may be inconsistent with our government's trade policies. Courts lack institutional competence to determine whether enforcement of foreign tax claims would serve the interests of the U.S.; they can provide no guarantee that the U.S. will have reciprocal rights to enforce similar claims abroad; and judicial enforcement of such claims would intrude on the Executive Branch's treaty-making authority and the policy judgments reflected in specific U.S. treaties. *See Attorney General of Canada*, 268 F.3d at 113 ("Concern about institutional role and competence provides particularly compelling support for the application of the revenue rule in this particular case."). The revenue rule "instructs the courts to leave this area alone, so that the legislative and executive branches may exercise their authority and bargaining power to deal with such issues." *United States v. Boots*, 80 F.3d 580, 588 (1st Cir. 1996); *see also Estados Unidos Mexicanos v. DeCoster*, 229 F.3d 332, 340 (1st Cir. 2000) ("Care should

be taken not to impinge on the Executive's treaty-making prerogatives or to assume that courts have the institutional competence to perform functions assigned elsewhere by the Constitution.").

B. There is no Basis for Revisiting Application of the Revenue Rule in this Case.

Faced with the uniform rejection of claims like theirs, and the long-standing principles invoked by the courts that have refused to adjudicate them, the Republics struggle to fashion an argument that would warrant the involvement of this Court. They settle on a flawed premise and a false conflict: an overly narrow definition of the revenue rule that lacks any historical basis and a purported conflict between the decision below and a case not brought by a foreign government asserting a civil claim for lost tax revenues, but by the Executive branch seeking to prosecute a crime. There is nothing to either argument.

Resorting to an argument they waived by not raising it before the Court of Appeals, the Republics claim that the "undisputed" purpose of the revenue rule is simply to prevent enforcement of foreign tax "judgments," and it was "never intended" to preclude suits against American corporations for evasion of foreign taxes if such activity violates "U.S. statutory law." Pet. at 3, 6. And even if the rule "would extend to such actions," the Republics contend, the Court of Appeals in *Pasquantino* supposedly recognized that "its applicability has never been established with such force and clarity" to supplant the plain language of the RICO statute that "creates the Plaintiffs' causes of action," *id.*, with the result that there is a split among the Courts of Appeals on the issue before the Court.

The problem with these arguments, other than waiver, is that they are simply not the law. As the Court of Appeals ruled below, as the Second Circuit ruled in *Attorney General of Canada*, and as the authorities above confirm, the revenue rule is a well-established common law principle that has long barred any attempt by foreign governments to use U.S. courts to collect foreign taxes. Pet. App. at 7; 268 F.3d at 130-31. Thus, the Republics have their statutory construction precisely backwards: the question is not whether the common law revenue rule "was intended" to preclude suits for violations of some undefined "U.S. statutory law," but whether RICO (or some other "U.S. statutory law," to use the Republics' term) "speaks directly" to the rule's ban on direct and indirect attempts to collect foreign taxes. *See United States v. Texas*, 507 U.S. 529, 534 (1993); *Honduras*, Pet. App. at 13; *Attorney General of Canada*, 268 F.3d at 128. Not even the Republics contend that it does, and the reason is clear: every court to consider the issue has agreed that neither RICO nor its legislative history contain any suggestion that Congress intended to abrogate the rule.

The Court of Appeals' decision in *Pasquantino* is not to the contrary. *Pasquantino* held only that the revenue rule was not implicated by a criminal prosecution by the U.S. government under the wire fraud statute, siding with the Second Circuit in a six-year old circuit split on this issue. Compare *Boots*, 80 F.3d at 587 (applying the revenue rule to bar wire fraud prosecution for smuggling scheme because court must pass on validity and operation of foreign revenue laws) with *United States v. Trapilo*, 130 F.3d 547, 553 (2d Cir. 1997) (rejecting contention that wire fraud prosecution for smuggling scheme implicates revenue rule because validity of foreign revenue law not at issue). In reaching *that* conclusion, the Court of Appeals was careful

to distinguish a criminal prosecution by the U.S. government from suits like those brought by the Republics here that seek enforcement of foreign revenue laws. Thus, *Pasquantino* specifically observed the "critical point" that a prosecution by the U.S. "does nothing to enforce any tax judgments or *claims*" that the foreign sovereign has against a defendant. *Id.* at 331 (emphasis added). "Neither does such prosecution enforce the revenue laws of the foreign sovereign involved." *Id.* And to the extent such prosecution raises matters of foreign relations, they can be resolved by the Executive, who has made the decision to indict. *See id.*

Here, by contrast, the RICO actions by the Republics "fundamentally deal with the adjudication of foreign tax claims," "seek to collect [their] unpaid taxes," and "seek redress for violations of the Republics' tax laws," raising issues that are "necessarily allocated to the political branches for resolution." *Honduras*, Pet. App. at 7-8. Two Courts of Appeals have considered whether the revenue rule bars such actions, and both have agreed that it does. Both found that the revenue rule has long barred any attempt by foreign governments to use U.S. courts to recover foreign taxes and that there is no indication in RICO or its legislative history that Congress intended to change that result. *Id.* at 12, 14; *Attorney General of Canada*, 268 F.3d at 106.[3]

Confronted with the absence of a conflict in the holdings of the Courts of Appeals, the Republics try to manufacture a conflict by asserting that *Pasquantino* somehow "disagreed"

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3. That the split regarding criminal enforcement of the wire fraud statute has no bearing on the question raised by this petition is confirmed by the Solicitor General, who stated in *Attorney General of Canada* that "[t]he conflict of the circuits on that question is not at issue here." Brief for the United States as Amicus Curiae, No. 01-1317, at 16 n.3.

with *Attorney General of Canada* regarding application of the revenue rule. In fact, just the opposite is true. The Court of Appeals in *Pasquantino* expressly *endorsed* the Second Circuit's statement that the revenue rule is "'a longstanding common law doctrine providing that courts of one sovereign will not enforce final tax judgments or unadjudicated tax claims of other sovereigns.'" *Id.* at 327 (quoting *Attorney General of Canada*, 268 F.3d at 109)). The Court of Appeals applied the same formulation of the revenue rule below, *see* Pet. App. at 6 (citing *Attorney General of Canada*), as have courts around the world for more than two centuries.

* * *

Given that the Courts of Appeals are in agreement that a foreign government may not directly or indirectly enforce its revenue laws in U.S. courts, the Republics' claim that the circuits are "in manifest disarray as to the 'proper scope' of the revenue rule," Pet. at 9, is pure hyperbole. Although a split exists on the issue whether the revenue rule prohibits the U.S. government from recognizing a foreign revenue law in a *criminal* prosecution under the wire fraud statute, that split did not matter in *Attorney General of Canada*, and it does not matter here.

II. The Republics Misstate the Impact of the Decision Below.

The Republics' arguments about the impact of the decision below on the justiciability of cases with foreign relations overtones are easily disposed. First, the Republics contend that, if left unreviewed, the decision below "would close the doors to friendly foreign governments" and "subvert settled expectations as to access by foreign sovereigns to U.S. courts. . . ." Pet. at 10. But these statements prove too much.

The Republics' alleged desire to permit "friendly foreign governments" access to our courts only underscores the need for leaving such decisions to the political branches, because courts cannot apply one set of rules for friends and another for foes. *See, e.g.*, *Boots*, 80 F.3d at 588 ("We do not condone defendants' smuggling activities, nor do we question Canada's revenue laws or the desirability of cooperation in respect to our mutual border. But application of the wire fraud statute to a scheme of this type does not, and cannot, turn upon our attitude towards Canada alone."). And "friendly foreign governments" can have no "settled expectations" about access to U.S. courts to enforce a foreign tax claim when the Republics cannot even point to a single case anywhere in the world in which such access has been allowed.

Next, the Republics contend that the decision below "could conceivably give rise to new forms of the act of state and political question doctrines that have not been countenanced by this Court in nearly half a century." Pet. at 10. But this is just another attempt by the Republics to create a certworthy issue where none exists. The Court of Appeals never even mentioned the act of state or political question doctrines. Rather, it merely cited *Baker v. Carr*, 369 U.S. 186 (1962) and *Oetjen v. Central Leather Co.*, 246 U.S. 297 (1918) for the unremarkable proposition that "[u]nder the Constitution, the power to conduct foreign relations is allocated to the political branches." *Honduras*, Pet. App. at 12. After invoking this proposition, moreover, the Court of Appeals observed that the political branches have yet to provide the Republics with a mechanism to collect foreign taxes, either by treaty or express statutory provision, a result fatal to their claims. *See id.* This does not "extend the revenue rule in a manner inconsistent with its common law history and purpose," Pet. at 14; rather, it enforces the rule just as it has operated for nearly three centuries.

III. The Revenue Rule is Not Preempted by RICO.

The Republics' final argument—that "[e]ven if the revenue rule would otherwise apply, it is preempted by the plain language of RICO"—has no basis in law or fact. It proceeds from a false premise: that the revenue rule's bar on the enforcement of foreign tax claims was not well established at the time Congress enacted RICO. *See* Pet. at 18. But all of the authorities are otherwise. *See Honduras*, Pet. App. at 14 ("Little question exists that the revenue rule is a 'long-established and familiar principle'" (quoting *Attorney General of Canada*, 268 F.3d at 111-12)); *Attorney General of Canada*, 268 F.3d at 126 ("it is clear that the revenue rule was well established by that date").

Because the revenue rule was firmly established in the common law, Congress could have abrogated it when enacting RICO only by "speaking directly" to the rule. "[W]here a common-law principle is well established . . . the courts may take it as [a] given that Congress has legislated with an expectation that the principle will apply except when a statutory purpose to the contrary is evident." *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991) (internal quotation omitted) (citations omitted). As this Court explained in *Astoria*, where the common law rule at issue protects "weighty and constant values," courts properly require a clear statement of Congress's intent to supplant that rule. *Id.* "In such cases, Congress does not write upon a clean slate. . . . In order to abrogate a common-law principle, the statute must 'speak directly' to the question addressed by the common law." *United States v. Texas*, 507 U.S. 529, 534 (1993) (quoting *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978)) (citation omitted). Here, moreover, the burden is on the Republics to overcome the presumption favoring the preservation of settled common-law rules.

See Green v. Bock Laundry Mach. Co., 490 U.S. 504, 521 (1989) ("A party contending that legislative action changed settled law has the burden of showing that the legislature intended such a change.").[4]

Applying these principles, the Eleventh Circuit below and the Second Circuit in *Attorney General of Canada* held that there is no language in RICO, much less a clear statutory statement, evincing any intention by Congress to abrogate the revenue rule: "the Republics have not demonstrated, nor has this court discovered, any evidence of a statutory purpose in the RICO statute that would except actions brought under it from the strictures of the revenue rule." *Honduras*, Pet. App. at 14; *Attorney General of Canada*, 268 F.3d at 129 ("RICO and its legislative history offer no hint that Congress intended the statute to afford a civil remedy to foreign nations for the evasion of foreign taxes. . . . For the statute to change such a time-honored common law prudential rule, it must 'speak directly' to the matter; yet it does not.").

Citing *United States v. Texas*, the Republics pay lip service to the requirement that a statute "speak directly" to

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4. This Court has also required Congress to state clearly its intent to require courts to adjudicate matters that touch on foreign relations. For instance, in *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138 (1957), the court declined to extend U.S. labor laws to controversies involving a foreign ship in a U.S. port: "For us to run interference in such a delicate field of international relations there must be present the affirmative intention of the Congress clearly expressed." *Id.* at 147; *see also McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963) (applying Benz clear statement rule); *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 500 (1979) (noting that *McCulloch* declined "to read the National Labor Relations Act so as to give rise to a serious question of separation of powers which in turn would have implicated sensitive issues of the authority of the Executive over relations with foreign nations").

an issue addressed by the common law in order to change it. But they never claim that Congress spoke directly to the revenue rule; rather, they claim that RICO and "analogous statutes" authorize "foreign law enforcement" of "tax laws." Pet. at 16. The problem is that none of the statutes cited by the Republics supports this contention. For example, the Republics cite 31 U.S.C. § 210(b)(2)(F), but that statute simply authorizes the director of Financial Crimes Enforcement Network in the Department of the Treasury to "assist Federal, State, local, and foreign law enforcement and regulatory authorities in combating the use of informal, nonbank networks and payment and barter system mechanisms that permit the transfer of funds or the equivalent of funds without records and without compliance with criminal and tax laws." Pet. App. at 56-57. It says nothing whatsoever about the ability of a foreign government to press a claim for foreign taxes in U.S. courts.[5]

The Republics also make the half-hearted argument that Congress "reaffirmed that RICO creates the causes of action pleaded here" when it rejected a "rule of construction" in the USA Patriot Act of 2001, Pub. L. No. 107-56, 115 Stat. 272, a provision that would have confirmed that the Patriot Act should not be read "to expand" the jurisdiction of any U.S. court to hear revenue claims by foreign governments. *See* Financial Anti-Terrorism Act of 2001, H.R. 3004, 107th

5. Indeed, the only statutory provision cited by the Republics directed to smuggling is a provision in RICO that defines "specified unlawful activity" as follows: "with respect to a financial transaction occurring in whole or in part in the United States, an offense against a foreign nation involving . . . smuggling or export control violations involving items on the Unites States Munitions List . . . or an item controlled under the Export Administration Regulations. . . ." 18 U.S.C. § 1956(c)(7)(B)(v). Cigarettes, of course, are not controlled items on the Munitions List or Export Administration Regulations.

Cong. § 106(b) (2001). This argument, which the Republics never raised with the district court, and which they raised for the first time in a reply brief in the court below, was correctly dismissed out of hand: "'The act of refusing to enact a law . . . has utterly no legal effect, and thus has utterly no place in a serious discussion of the law.'" *Honduras*, Pet. App. at 16 (quoting *United States v. Estate of Romani*, 523 U.S. 517, 535 (1998) (Scalia, J., concurring)); *see also Romani*, 523 U.S. at 534 (a failure to enact a legislative proposal "provide[s] no support for the hypothesis that both Houses of Congress silently endorsed" the opposite proposition).

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

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